

STATE OF MICHIGAN

COURT OF APPEALS

PRESERVE THE DUNES, INC., )  
a Michigan Not For Profit ) Court of Appeals  
Corporation, ) No. 231728  
Plaintiff-Appellant, )  
)  
vs. ) Berrien County Trial  
) Court – Civil Division  
) File No. 98-3789-CE-S  
MICHIGAN DEPARTMENT OF )  
ENVIRONMENTAL QUALITY and )  
TECHNISAND, INC., a Delaware )  
Corporation, )  
Defendants-Appellees. )  
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**PLAINTIFF-APPELLANT'S RENEWED MOTION FOR  
INJUNCTION PENDING APPEAL**

Appellant Preserve the Dunes, Inc. renews its prior Motion for Entry of an Order pursuant to MCR 7.216(A)(7) to enjoin Appellee TechniSand, Inc. from mining within the critical dunes area of the Nadeau Site or from taking any further action that may physically disturb or alter the critical dunes area until such time as this Court decides the appeal filed by Appellant from the December 13, 2000 Order of Final Judgment by the Trial Court for Berrien County. If an injunction is not entered, the critical dunes area will suffer continuing irreparable injury and this Court will be unable to render a meaningful decision on the merits of the appeal. In support of its Motion, Appellant states as follows:

1. This case involves a suit under the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* (“MEPA”), filed in the Berrien County Trial Court challenging a sand mining permit issued by Co-Appellee Michigan Department of Environmental Quality (“MDEQ”) to TechniSand. The permit allows TechniSand to expand a non-critical dune mining operation into an adjacent critical dunes area located in Hagar Township, Berrien County. The Appellant’s lawsuit sought to permanently enjoin TechniSand from mining the critical dunes area of the Nadeau Site.

2. The critical dunes area at the Site has been designated for protection under various statutes since 1978. The critical dunes area was designated as a critical dune pursuant to the Sand Dune Protection and Management Act, MCL 324.35301 *et seq.* (“Part 353”) by Rule 281.201, adopted by the Michigan Department of Natural Resources on August 17, 1978. At trial, all parties agreed that the area under the contested permit constitutes critical dunes as defined by the Sand Dune Mining Act, MCL 324.63701 *et seq.* (“Part 637”).

3. The Trial Court entered a final judgment of no cause of action under MEPA finding that the proposed mining activities did not violate the critical sand dune mining

restrictions of Part 637. The Court upheld the MDEQ sand mining permit, thereby denying Appellant's request for injunctive relief and paving the way for TechniSand to mine the critical dunes area.

4. The Appellant timely appealed the Trial Court's decision.

5. Following the Trial Court's decision below, TechniSand brought an action against Hagar Township for injunctive relief to rezone the area so as to allow it to mine sand in the critical dunes area. TechniSand also sought damages for denial of the rezoning.

6. On January 15, 2002, the Hagar Township Board entered into a Final Settlement Agreement with TechniSand which effectively rezoned the property and which allowed TechniSand to commence mining activities in the critical dunes area at issue in this appeal. The Settlement Agreement has been filed with the Berrien County Trial Court.

7. On January 18, 2002, three days following the entry of the Settlement Agreement between Hagar Township and TechniSand, the Appellant filed a Motion with this Court for an injunction prohibiting TechniSand from mining within the critical dunes area of the subject property until such time as this appeal was decided.

8. On January 31, 2002, this Court entered an Order denying the Appellant's Motion for Injunction. However, the Court granted the Appellant's request to expedite the appeal. The Court ordered the matter to be placed on the April case call, and the case was argued on April 10, 2002.

9. Although the case was argued more than four months ago no decision has yet been rendered. In the meantime, TechniSand has mined and is continuing with its mining activities for cell units 5 and 6, which are within the critical dunes area of the subject property. DEQ mining inspection reports demonstrate that TechniSand has already stripped sub soils,

shrubs and trees from the eastern portion of cells 5 and 6, has stockpiled approximately 30,000 tons of raw sand (approximately 22,000 cubic yards), and is mining to the west in cell 6 (see attached reports).

10. For reasons more specifically set forth in its original Motion for an Injunction and its Brief on appeal and its Reply Brief and as articulated during oral argument, it is likely that the Appellant will prevail on the merits of the appeal. However, if TechniSand proceeds in mining the critical dunes area under the DEQ permit and the Settlement Agreement with Hagar Township, the dunes will be eradicated as a natural feature forever and this appeal will be moot. There is no way to undo the injury that is being sustained and will be sustained and the natural benefit of the critical dunes area will be lost to the public, contrary to the legislature's intent in Part 353 and Part 637.

11. This Court has authority to issue an injunction to protect the subject matter of the appeal. MCR 7.216(A)(7); MCR 2.614(F)(2), (3).

#### **Relief Requested**

For the reasons set forth above it is likely that Appellant will prevail on the merits. However, if TechniSand's mining activities are not enjoined pending the appeal, the critical dunes at the Nadeau Site Expansion will forever be gone, irreparably injuring the environment and rendering any decision of the Court of Appeals meaningless. Appellant Preserve the Dunes, Inc. therefore moves this Court to enter an order enjoining Appellee TechniSand, Inc. from mining within the Nadeau Site Critical Dunes Area or taking any other action that may permanently and physically disturb or alter the critical dunes area until such time as this Court decides the underlying appeal in this action.

Dated:

TAGLIA, FETTE, DUMKE & WHITE, P.C.

August 22, 2002

By: \_\_\_\_\_  
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